Supreme Court, U. S.
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No. 80-265

In the Supreme Court of the United States

OCTOBER TERM, 1980

PETER MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and individual members of the Navajo Tribe,

Petitioner,

v.

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and individual members of the Hopi Tribe,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner's Questions presented do not properly or accurately frame the questions in the context of this case and the decision of the court below. Respondent submits that if review is to be granted, then the issues raised in the petition should be stated as follows:

1. Whether the court of appeals has properly required proof of definite congressional intention to support the Navajo claim that a portion of the lands in issue was statutorily confirmed as an Indian reservation for the Navajo Tribe by the Act of May 27, 1902, 32 Stat. 245, 264-65.

2. Whether the court of appeals has properly applied the precedent of *Healing v. Jones*, 210 F.Supp. 125 (D. Ariz. 1962), *aff'd per curiam*, 373 U.S. 758 (1963), in determining that the beneficial interest of the "other [Hopi] Indians" referred to in the Act of June 14, 1934, 48 Stat. 960, is an exclusive interest in those lands which were exclusively utilized by the Hopi Indians in 1934, and a joint or undivided interest with the Navajo Tribe in lands which were then utilized by both tribes.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

In addition to the citations of the opinions below contained in the petition, the decision of the Court of

Appeals has been reported as *Sekaquaptewa v. MacDonald*, 619 F.2d 801 (9th Cir. 1980).

Statement of the Case

Respondent Sekaquaptewa has filed with this Court a petition for a writ of certiorari seeking review of the same decision as that for which petitioner MacDonald seeks review herein. *See Sekaquaptewa v. MacDonald*, No. 80-258, filed August 20, 1980. Because the named parties appear in a representative capacity primarily on behalf of the tribes which they represent, the position of petitioner MacDonald will be referred to as the "Navajo" position, and that of respondent Sekaquaptewa will be referred to as the "Hopi" position.

The Navajo Statement of Facts, petition at 4-6, is not a factual statement, but is part of the Navajo argument in support of its first Question Presented, containing conclusions of ultimate facts rejected by the courts below. Specifically, the Navajo Statement of Facts mischaracterizes the status of the lands in issue prior to 1934. *See* petition at 4 n.2. The petition implies that the Navajos had some prior vested rights in the lands withdrawn by the executive orders listed in footnote 2 of the petition. This is simply not true.

Prior to the Act of June 14, 1934, 48 Stat. 960 (the "1934 Act"), a succession of executive orders from 1880 to 1918 had withdrawn lands in which "neither tribe had recognized (compensable) title."[1] The

[1] **Sekaquaptewa v. MacDonald**, 619 F.2d 801, 804 (9th Cir. 1980), petition at 31a.

Navajos argue that title to the lands withdrawn by one of those executives orders (January 8, 1900) was confirmed by a 1902 appropriations act.[2] The fact is that the Executive Order of January 8, 1900, does nothing more than withdraw the described area "from sale and settlement until further ordered" (petition at 54a), and neither the Executive Order of January 8, 1900, nor the 1902 appropriations act makes any mention whatsoever of the granting of title to either the Navajo Indians or Navajo Tribe. As developed more fully below, the status of the 1900 Executive Order lands remained unconfirmed until the 1934 Act changed the status of all those unconfirmed executive order lands from a "tenancy at will to a permanent compensable interest."[3] The purpose of this case is to determine the rights and interests granted to the Hopi and Navajo Tribes by the 1934 Act.

Summary of Argument

On August 20, Respondent Sekaquaptewa filed with this Court a petition for a writ of certiorari which includes petitioner's second question regarding the proper interpretation of the precedent of *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd per curiam*, 373 U.S. 758 (1963). The issues raised by petitioner MacDonald with respect to this matter can be fully reviewed in the context of respondent Sekaquaptewa's petition.

The first question presented by the petition is frivo-

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[2] **Act of May 27, 1902, 32 Stat. 245, 264-65, petition at 62a.**
[3] **Sekaquaptewa v. MacDonald, 619 F.2d 801, 804 (9th Cir. 1980), petition at 32a.**

lous and not appropriate for further review by the Court. Contrary to the Navajo Statement of the Question, the court below has not changed any existing rule of law by deciding that a "strict standard" must be applied in judging a claim that an Indian reservation has been statutorily confirmed. Neither has it required that the statute alleged to have had that result must "make mention of title." Rather, consistent with many decisions of this Court, the court of appeals has properly required proof of definite congressional intent to support the Navajo claim that the 1902 Indian Appropriation Act statutorily confirmed a permanent, vested title in the Navajo Tribe to the lands first set apart by the 1900 Executive Order. That decision is correct on the facts of this case, which facts demonstrate no such congressional intent. The decision is confined to those facts and does not jeopardize any interest of any other Indian tribe.

ARGUMENT

I

THE QUESTION OF THE PROPER APPLICATION OF *HEALING v. JONES* TO THIS CASE SHOULD BE CONSIDERED IN RESPONDENT SEKAQUAPTEWA'S PETITION FOR CERTIORARI.

A. Review of the Application of *Healing v. Jones* to this Case is Appropriate Only as Presented in Respondent's Petition Seeking Review of the Same Decision.

Respondent Sekaquaptewa's own petition for certiorari raises the question of the proper application to this case of the precedent of *Healing v. Jones*, 210 F.Supp. 125 (D.Ariz. 1962), *aff'd per curiam*, 373 U.S. 758 (1963) (herein "*Healing v. Jones*"). While that question is a significant and important matter to the tens of thousands of Indians residing in the area in dispute, the question should be decided in the context provided by the Hopi petition, *Sekaquaptewa v. MacDonald*, No. 80-258, filed August 20, 1980.

Healing v. Jones was a quiet title action between these same two tribes, appearing through their tribal chairmen. It involved title to executive order Indian reservation lands adjacent to those in issue in this case, and involved the construction of a grant to a named Tribe (the Hopis), with reference to "other Indians" (the Navajos) as additional grantees. Under *Healing v. Jones*, the Navajo Tribe, as the "other Indians" received a one half-interest in nearly two million acres of the "Hopi Reservation." The decision of the special three judge court which decided *Healing* was affirmed on direct appeal to this Court.

In the two petitions for certiorari now before the Court in this case, the Hopi and Navajo Tribes take very different views of how this case should be decided in light of the *Healing v. Jones* decision. Both tribes disagree with the way in which the court of appeals has applied that decision to this case. The court of appeals' view of the case differed in several material aspects from that of the district court.

The District Court held that the 1934 Act granted the Navajos an interest in all the lands in issue but that the Hopis were only entitled to a one-half interest in what they were using, occupying, or possessing on June 14, 1934.

The Court of Appeals reversed in part and held that the Hopi Tribe had an exclusive interest in those portions of the reservation which it was exclusively using, occupying, or possessing on June 14, 1934, and a joint interest with the Navajo Tribe as to those portions which they were jointly using, occupying, or possessing as of that date.

As set forth below, the Navajo petition's version of the matter is not supported by the *Healing v. Jones* decision. Respondent respectfully suggests that review be undertaken in connection with the review requested in respondent's petition No. 80-258, which properly raises the relevant question in the context of this case.

B. *Healing v. Jones* Does Not Support the Result Urged in the Petition.

The Navajo Petition challenging the ruling of the Court of Appeals is based entirely upon an erroneous reading of *Healing v. Jones*. The Navajos incorrectly assert that the decision of the District Court is the only decision which would have been consistent with *Healing v. Jones* because in *Healing v. Jones*, the Hopis received an interest throughout the entire reservation and the Navajo, as the "other Indians," received only a "one-half interest in lands exclusively occupied by

Navajos" and that "the roles of the Navajo and Hopi Tribes" are the reverse in this case. Petition at 15-16.

While noting the similarities in the two situations, the Navajos' argument fails to recognize the differences. The Navajos' petition argues that the acknowledged value of *Healing v. Jones* as a precedent herein requires that an identical outcome follow in both cases, namely that the named tribe has an interest in all the area and that the "other Indians" must prove use and occupancy to obtain an interest. Such an argument, however, ignores the fact that the granting language considered in *Healing v. Jones* contained an express condition subsequent on the interest of the "other [Navajo] Indians" requiring their settlement by the Secretary of the Interior as a condition to obtaining an interest.

The Navajo position ignores the important fact that the *Healing* Court held that the Hopis gained the right to use and occupy the entire reservation "immediately upon the issuance of the executive order."[4] Under *Healing*, the Hopi interest arose "by the self-operating effect" [5] of the 1882 Executive Order with "no further proceedings by way of Secretarial settlement or otherwise being required" [6] This right of use and occupancy was nonexclusive in that it was subject to diminution by Secretarial settlement of "other Indians." The *Healing* Court further ruled that the Navajos, on the other hand, did *not* gain an *immediate* interest and were therefore

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[4] **Healing v. Jones**, 210 F.Supp. at 138.
[5] **Id. at 175.**
[6] **Id. at 138.**

required to prove Secretarial settlement.[7] The ultimate holding of *Healing v. Jones* was that the Hopi and Navajo Tribes had a "joint, undivided, and equal interest" [8] in those areas in which the Navajo were subsequently settled.

In contrast to the factual situation present in *Healing v. Jones*, the granting language of the 1934 Act does not contain any condition subsequent as to the interest of the "other [Hopi] Indians." The rights of *both* the Navajo and the "other [Hopi] Indians" arose *simultaneously* and in the same way as the Hopi rights arose under the 1882 Executive Order, that is by the self-operating effect of the grant. Thus, the 1934 Act granted the Hopis an immediate vested interest with the Navajos throughout all the lands now in issue. Such right was not subject to diminution.

Healing v. Jones thus does not support a finding of identical results, as the Navajo's petition claims, where the granting language is as found in the 1934 Act. Rather, it supports the Hopi theory of the proper application of that decision as asserted in the Hopi petition, No. 80-258.

The claims made in support of the second Navajo question are contrary to the language of *Healing v. Jones*. The question of the proper application of the precedent of *Healing v. Jones* to the granting language of the 1934 Act should be considered in the context presented by the Hopi petition.

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[7] **See, Healing v. Jones, 210 F.Supp. at 143.**
[8] **Healing v. Jones, 210 F.Supp. at 189.**

II

PETITIONER'S ARGUMENTS REGARDING PURPORTED STATUTORY CONFIRMATION OF THE 1900 EXECUTIVE ORDER AREA BY THE ACT OF MAY 27, 1902, ARE INSUBSTANTIAL AND ARE OF NO GENERAL INTEREST.

Respondent Sekaquaptewa submits that the Navajo arguments regarding the purported statutory confirmation of an area of the lands in issue by the Act of May 27, 1902, 32 Stat. 245 (the "1902 Act"), are both insubstantial and of no general interest. Certiorari need not be granted to review and interpret that 1902 Act.

A. The Navajo Petition Misstates the Relevant Issue.

The Navajo petition confuses two separate and distinct concepts and attempts to apply the standard of one to the other. The first concept, and the issue presented to the court of appeals, was whether a compensable, vested interest in the lands withdrawn by the Executive Order of January 8, 1900 had been conveyed to the Navajo Tribe by the 1902 Indian Department Appropriation Act of May 27, 1902, 32 Stat. 245, 264-65, referred to in the Navajo petition and herein as the "1902 Act." The important distinction between an unconfirmed executive order reservation and a confirmed statutory reservation is that the Indians involved have no "recognized (compensable) title" [9] or interest in an

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[9] **Sekaquaptewa v. MacDonald, 619 F.2d at 804, petition at 31a-32a.**

executive order reservation, while they have a vested, compensable interest in a statutorily confirmed Indian reservation.

The second distinct concept concerns the creation of an Indian reservation. The Navajo Petition attempts to apply the test for creation of an Indian reservation to the issue of whether "recognized (compensable) title" has been granted to a tribe, and faults the court of appeals for not doing the same. Indian reservations may be created in a number of different ways, such as by treaty, by statute, or by executive order. The area involved is properly called an "Indian reservation" whether or not the Indians receive "recognized (compensable) title" by the action creating the reservation. The case of *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), cited in the Navajo petition at 9, involved the question of whether a reservation had been created. It does not involve the question presented in this case as to whether "recognized (compensable) title" had been granted to a tribe. Likewise the case of *Sac & Fox Tribe v Licklider*, 576 F.2d 145 (8th Cir. 1978), cited in footnote 6 of the Navajo petition, dealt with the issue of whether fee lands purchased by the Indians had become an Indian reservation because of various federal actions, not whether Congress had conveyed "recognized (compensable) title" to the Indians.

The court of appeals did not hold "that a 'strict standard' must be applied to statutes purporting to establish Indian reservations" as asserted in the Navajo petition at 7. That was not the issue presented to it. The question was whether Congress had divested the

United States of its ownership of the beneficial interest in the 1900 Executive Order lands and had vested that compensable interest in the Navajo Tribe by means of the 1902 Act, which makes no mention of either the Navajo Tribe or of such an intent. In determining this issue, the court of appeals applied the standards set forth below, which are based upon and are entirely consistent with the decisions of this Court.

B. The Language of the 1902 Act Does Not Support the Navajo Argument.

The deficiency of the Navajo argument is best illustrated by the plain language of the 1902 Act and the executive order in question. By Executive Order dated January 8, 1900, the area alleged to have been statutorily confirmed by the 1902 Act was set aside by these words:

> It is hereby ordered that the tract of country [description omitted] be, and the same is hereby, withdrawn from sale and settlement until further ordered.

Ex. H. 29; Ex. N. 32.[10] No mention is made in the order of either the Navajo Tribe or of Indian use.

The statutory language which the Navajo petitioner claims had the effect of confirming that reservation and, therefore, necessarily vesting a permanent, compensable, equitable title in the Navajo Tribe, is found in a 1902 appropriation act. The complete relevant text of that

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[10]The background and legislative and administrative history were presented to the district court by the parties by means of eight bound volumes of historical documents. Documents submitted by the Hopi plaintiff were designated "Ex. H. ....."; those submitted by the Navajo defendant, "Ex. N. ....."

act, a significant part of which is omitted from the text of the Navajo petition, *see* petition at 13, is as follows:

> For the purchase of the right, title, and improvements of certain settlers within the external boundries [sic] of the Navajo Indian Reservation in Arizona, *as set out in* the communication of the Secretary of the Interior to the President, dated January fifth, nineteen hundred and *printed in* Senate Document Numbered Sixty-eight of date of January tenth, nineteen hundred, forty-eight thousand dollars, to be used and expended under the direction and within the discretion of the Secretary of the Interior. And the Secretary of the Interior is authorized and empowered to purchase the right, title, and improvements separately of each and every one of the *said persons named in the said communication* of the Secretary of the Interior, at the price separately agreed upon with the settlers therein named. And when so purchased the improvements *and the lands upon which they are situated, in and near Tuba City, are hereby set apart for school or public purposes, as may be hereafter decided upon by the Secretary of the Interior, and until required to be used for such public or school purposes shall be used by the Indians under rules and regulations to be prescribed by the Secretary of the Interior: Provided,* that the appraisement of Earnest A. Lee's property shall be three thousand seven hundred dollars: *Provided further,* that the Secretary of the Interior shall make no payment for any of said right, title, and improvements unless in his judgment the valuation thereof is fair and just.

32 Stat. 245, 264-65 (May 27, 1902) [Emphasis added]. The statutory language which the text of the Navajo petition conveniently fails to quote provides that

the improvements to be purchased "and the lands upon which they are situated" are specifically set apart "for school or public purposes" as determined by the Secretary of the Interior, with "Indian" usage (not "Navajo" usage) to be permitted temporarily only "until [such lands are] required to be used for such school or public purposes."

Thus, far from confirming in the Navajo Tribe a permanent, vested, and compensable interest in the 1900 Executive Order Reservation lands as claimed in the petition, the 1902 Act merely provided an appropriation of funds to purchase certain pioneer improvements, while specifically stating that "Indian" usage of the lands was to be temporary until the primary "school or public purposes" could be decided upon and implemented by the Secretary of the Interior.

Contrary to the suggestion in the petition, the court below has not stated that the 1902 Act must have made "mention of title" to achieve a statutory confirmation. Rather, that court correctly noted that the 1902 Act itself makes no such mention, a factor relevant to determining the congressional intent. *See Sekaquaptewa v. MacDonald*, 619 F.2d at 805, petition 34a.

C. The Description of the Area as the "Navajo Reservation" Has No Effect on the Indian Title.

The Navajo argument apparently rests on two bases which are clearly insubstantial under the relevant decisions of this Court. The first is the fact that the area

set aside by the 1900 Executive Order is referred to in the 1902 Act as the "Navajo Indian Reservation in Arizona." Thus, the Navajos infer, Congress must have intended to confirm the title in the Navajo Tribe by that reference.

The record reveals that the 1900 Executive Order lands were in fact administered by the Department of the Interior as Indian reservation lands despite the absence of specific Indian-related purpose in the executive order itself. As such, the numerous holdings of this Court regarding the nature of the Indian interest in an Executive Order Indian Reservation are particularly applicable. *See, e.g., Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949):

> An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim.

See also Healing v. Jones, 210 F.Supp. 125, 138 (D. Ariz. 1962), *aff'd per curiam*, 373 U.S. 758 (1963); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 331 (1942) ("the interest which the Indians received was subject to termination at the will of either the executive or Congress and without obligation to the United States.").

Indeed, the language of the 1902 Act, as fully quoted above, confirms that the "Indians" were to have no more interest after the passage of that act than the

temporary use interest that they had before its passage. *See Confederated Bands of Ute Indians v. United States,* 330 U.S. 169, 176 (1949):

> Nor is there any indication in the findings that the President intended to convey more than a transitory, possessory interest by the 1875 Order. That order made the Indians no more than tenants at the will of the Government on that part of the land outside the true treaty reservation.

As noted in the *Hynes* case quoted above, an area set aside by executive order for Indian use is frequently and properly referred to as an "Indian reservation." As this Court has noted in the case of *Minnesota v. Hitchcock,* 185 U.S. 373, 388-89 (1902), decided at nearly the same time as the 1902 Act was passed, the name given to an area speaks nothing of the title status of that area.

> Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. . . .
>
> *The mere calling of the tract a reservation instead of unceded Indian lands did not change the title. It was simply a convenient way of designating the tract.* [Emphasis added.]

Similarly, this Court has held in cases where permanent reservation status was alleged to have been terminated by Congressional action, that the reference to a reservation "in the past tense" or as the "former" reservation in subsequent legislation cannot "be read as in-

dicating any clear purpose to terminate the reservation directly or by innuendo." *Mattz v. Arnett*, 412 U.S. 481, 498 (1973). *See also Seymour v. Superintendent*, 368 U.S 351, 356 n.12 (1962).

Thus, without considerably more in the way of demonstrated Congressional interest, the mere reference to the 1900 Executive Order area as the "Navajo Indian Reservation" carries no significance. It was merely a name for a place.

D. The Reference in the 1902 Act to Senate Document 68 Was Not Sufficient to Confirm a Vested Compensable Interest in the Navajo Tribe.

The second part of the Navajo argument in this regard is the claim that Congress, by referring in the 1902 Act to a particular Senate document, necessarily intended to and did in fact incorporate by reference a suggestion made in one of the letters reproduced in the Senate document, to the effect that it would be desirable if the area in question could be set apart as a reservation. The reference to the Senate document thus supplies, the Navajos argue, not only the intent to achieve the unstated result, but the statutory implementation of that unstated result, and, indeed, does so for the benefit of the Navajo Tribe which is itself not mentioned.

It should be noted as a matter of first order, that the language of the 1902 Act does not state or suggest any intent to incorporate the Senate document by reference. Rather, it refers to that document as an official

source in which can be found both the legal description of the lands affected by the 1900 Executive Order and the names of the settlers whose improvements were to be purchased. *See* the 1902 Act which provides:

> For the purchase of the improvements of certain settlers within the external boundaries [sic] of the Navajo Indian Reservation in Arizona, *as set out in the communication* of the Secretary of the Interior to the President, dated January fifth, nineteen hundred, *and printed in Senate Document Numbered Sixty eight,* of date of January tenth, nineteen hundred . . . . and the Secretary of the Interior is authorized and empowered to purchase the . . . improvements . . . of the *said persons named in the said communication.* [Emphasis added.]

Those were the only references in the 1902 Act to the Senate Document. It is referred to for the simple purpose of identifying an officially published source in which the legal description of the 1900 Executive Order lands and the names of the settlers were "printed." This is hardly an example of a document being "explicitly" or "clearly" incorporated by reference as the Navajo petition asserts. *See* petition at 6, 13 n. 10, 14.

Indeed, an examination of Senate Document No. 68 (Ex. N. 33, S.Doc. No. 68, 56th Cong. 1st Sess. (1900)), reveals that it is a composite document composed of correspondence, schedules of improvements owned by settlers, lists, appraisals, agreements, and even a proposed legislative bill. Under the Navajo theory, all such documents are necessarily now the law of the land by virtue of their being adopted by reference into

the 1902 Act. However, the letters which the Navajos rely upon were the documents which preceded the issuance of the 1900 Executive Order and which provided the justification for its issuance. As the documents indicate, it was intended that "[i]f the Congress shall appropriate the moneys necessary to pay the settlers, the reservation can then be enlarged by Executive order, as recommended by the inspector." Ex. N. 33 at 15. Notwithstanding the fact that it preceded the appropriation referred to, the withdrawal of the area by executive order in 1900 achieved the desired result of providing new, reserved Indian grazing lands without the need for congressional action. None of the items in Senate Document 68 suggest that the Navajos needed to have permanent reservation title to achieve that desired result.

Further examination of Senate Document 68 reveals that a draft bill containing language which could arguably have done what the Navajos now claim did occur was reprinted as part of that Senate document, but that nothing remotely resembling the express and specific language of the bill was included in the 1902 Act in regard to the reservation boundaries. The proposed bill began as follows:

> A BILL establishing the boundaries of an addition to the Navajo Indian Reservation, Arizona, and making appropriation for purchasing the improvements of settlers within the addition.
>
> *Be it enacted* . . ., That the tract of land lying west of the Navajo and Moqui Indian reservations, in Arizona, embraced within the following

> described boundaries, be, and the same is hereby, set aside as an addition to the Navajo Indian Reservation, namely: [Description omitted].

Ex. N. 33 at 19. Section 2 of that bill dealt with the appropriation of money to purchase the improvements of the settlers, and is similar to the language which was incorporated in the 1902 Act.

Such a contrast between the language proposed and the language adopted by Congress has been considered significant in Indian reservation status cases as indicating a congressional rejection of the result which the proposed but unenacted language might have produced. *See Mattz v. Arnett*, 412 U.S. 481, 497-506 (1973). Thus, prior to 1902, Congress had language suggested to it which could arguably have achieved the result urged by the Navajos, but Congress simply chose not to enact it.

It is also significant to note that, as revealed by the record, the Department of the Interior and Congress never subsequently viewed the 1900 Executive Order area as having been confirmed by the 1902 Act, particularly when they undertook consideration of what became the 1934 Act. As noted by the district court in rejecting this Navajo argument:

> The Hopi village of Moencopi is within the 1900 executive order reservation. One stumbling block to passage of the 1934 Act was the presence of this Hopi village. The Navajo tribe would read the status of the Moencopi village completely out of the 1934 Act.

448 F.Supp. at 1192, petition 16a. The district court

apparently believed that acceptance of the Navajo argument on this point would remove the 1900 Executive Order area, including the Hopi village of Moencopi, from the effect of the 1934 Act, making it an exclusively Navajo-owned area by the force of the 1902 Act. Such a result was determined by both courts below to be inconsistent with the statutory language and legislative motives behind both the 1902 and 1934 Acts, and the Navajo arguments were properly rejected.

E. The Court of Appeals has Properly Required Proof of Clear Congressional Intent.

Given these facts, application of the appropriate decisional standard demonstrates that this point of the Navajo petition is neither of general interest nor worthy of further judicial consideration.

The test for determining this question has been set forth by this Court in a number of cases. In *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), the Sioux Tribe claimed that the General Allotment Act of 1887, 25 U.S.C. §331 *et. seq.*, had statutorily confirmed their executive order reservations and created "recognized title" in the Indians because the Allotment Act had statutorily refered to executive order reservations. This Court rejected that idea by adopting the following statement of a congressional committee:

> It would be preposterous to place such a construction upon the language of this Act as would divest the United States of its title to these lands.

In Confederated Bands of Ute Indians v. United

States, 330 U.S. 169, 177-78 (1947), this Court rejected a claim that an 1880 Act which ratified a treaty with the Ute Indians had confirmed a compensable interest in the Tribe in certain Executive order areas mentioned in the 1880 Act.

> There is not one word in that Act showing a congressional purpose to convey the Executive Order lands, or any other lands, to the Indians. . . .
>
> Nor is it possible to deduce from the 1880 Act a congressional purpose to transform the Executive Order into a conveyance of something more than a mere temporary and cancellable possessory right to the Indians. *Neither the language of the 1880 Act, its legislative history nor the circumstances which brought it about, justify the claim that Congress intended to expand the Executive Order into a transfer of a compensable interest in lands not included in the original treaty reservation.* [Emphasis added.]

In *Sac & Fox Tribe of Indians of Oklahoma v. United States,* 315 F.2d 896, 900 (Ct. Cl. 1963), the Court of Claims stated:

> Appellants apparently assume that "recognition" or "acknowledgment" necessarily follow from an acceptance by the United States of the bare fact that the particular Indians dwelt or hunted, or claimed to dwell or hunt, in the area at that time. *But there must be another indispensable element before recognition is had. The Congress must affirmatively intend to grant the right to occupy and use the land permanently.* [Emphasis added.]

This Court again stated in *Hynes v. Grimes Packing Co.,* 337 US. 86, 104 (1949), another case where

it was claimed that title to an executive order reservation had been confirmed in the Indians:

> When Congress intends to delegate power to turn over lands to the Indians permanently, *one would expect to and doubtless would find definite indications of such purpose.* [Emphasis added.]

The Navajo Petition incorrectly asserts that the court of appeals misapplied and overlooked the case of *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). A full and complete quotation from the case is in full accord with the decision of the court of appeals as it relates to this issue.

> There is no particular form of congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but *there must be the definite intention by congressional action or authority to accord legal rights not merely permissive occupation.* [Emphasis added.]

348 U.S. at 278-79. The critical second sentence of this quotation was omitted in the Navajo petition's quotation of this authority, *see* petition at 11.

As stated in the language of the 1902 Act itself, the lands therein affected were to be reserved for "school or public purposes" with "Indian" use permitted temporarily only until the public purpose could be implemented by the Secretary. That language is precisely suited to exactly the opposite result urged in the Navajo petition. It speaks nothing of granting permanent rights to the unmentioned Navajo Tribe.

These cases also clearly demonstrate that the general rule of liberal construction in Indian legislation, cited in the Navajo petition at 9, does not apply to the confirmation of executive order reservations and consequent divestment of beneficial title from the United States. As this Court stated in *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116 (1957):

> Such a construction would run counter to the established rule that land grants are construed favorably to the Government, that nothing passes *except what is conveyed in clear language, and that if there are doubts they are resolved for the government, not against it* [Emphasis added.]

The Navajo theory thus finds no support in the applicable cases. As demonstrated above, it likewise finds no support in the legislative background and history of either the 1902 or 1934 Acts.

F. The Decision of the Court Below on the Navajo Statutory Confirmation Argument will not Affect Other Statutory Indian Reservations.

Contrary to the claim in the Navajo petition, the decision of the court of appeals will have no effect on statutorily created reservations such as those listed in footnote 8 of the petition. The title status of those reservations remains, as it did prior to the court of appeals' decision, subject to determination under the standards set in this Court's *Sioux*, *Confederate Ute*, *Hynes*, and *Tee-Hit-Ton* cases.

When Congress intends to statutorily confirm an executive order Indian reservation, it does so by express language. *See, e.g.*, the Act of July 22, 1958, Pub.L. 85-547, § 1, 72 Stat. 403, which vested the Indian title in the Hopi 1882 Executive Order Reservation and provided the jurisdiction for the *Healing v. Jones* litigation between these same two tribes:

> That lands described in the Executive Order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order.

The contrast between such clear and express language of grant and recognition and the language of the 1902 Act should put to rest any suspicion that the court below erred in rejecting the Navajo implied confirmation theory for the 1900 Executive Order area and the 1902 Act. It should further dispel any worry that the decision of the court below will somehow unsettle the status of statutorily confirmed or established Indian reservations.

The Navajo argument is not worthy of further consideration by the Court.

CONCLUSION

Review of petitioner MacDonald's first Question presented should be denied; the second Question pre-

sented should only be reviewed as requested in the Hopi petition, *Sekaquaptewa v. MacDonald,* No. 80-258, filed August 20, 1980.

Respectfully submitted,

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